

October 4, 2007

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
NUCLEAR FUEL SERVICES, INC	)	Docket No. 70-143-CO
	)	
Special Nuclear Materials Facility	)	ASLBP No. 07-857-01-CO-BD01
(Confirmatory Order)	)	

NRC STAFF'S OPPOSITION TO KEN SILVER'S REQUEST  
FOR EXTENSION OF TIME IN WHICH TO FILE A REPLY

INTRODUCTION

On August 17, 2007, the Petitioner, Ken Silver, filed a request for hearing<sup>1</sup> on a Confirmatory Order issued to the Licensee, Nuclear Fuel Services, Inc. The Staff responded to the Petitioner's hearing request on September 11, 2007, arguing that the Board should deny the request because the Petitioner fails to demonstrate he has standing to participate in a hearing or any contention that would be admissible.<sup>2</sup> On September 25, 2007, the Petitioner submitted a letter asking the NRC to grant him what would be, in effect, a 57-day extension of time in which to file a reply to the Staff's response.<sup>3</sup> The Board should deny this request because the

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<sup>1</sup> "Request for Hearing Submitted by Kenneth Silver" (August 17, 2007).

<sup>2</sup> "NRC Staff's Response to Hearing Request of Ken Silver" (September 11, 2007).

<sup>3</sup> "Petitioner, Ken Silver, Request for Extension of Deadline for Reply to NRC Staff Response to Hearing Request" (September 25, 2007).

Petitioner fails to provide a sufficient basis for granting *any* extension time, much less an extension as long as 57 days.

#### LEGAL STANDARD

10 C.F.R. § 2.309(h)(2) requires a petitioner to file its reply to any Staff or Licensee answer to a hearing request within seven days after service of that answer. If the petitioner is unable to meet that deadline, the petitioner must seek an extension of time in which to file its reply. Pursuant to 10 C.F.R. § 2.307, the Board may grant an extension of time, but only if it finds there is good cause for such an extension, or if the Board is approving a stipulation by the parties.<sup>4</sup> The Commission has explained that because “[a]ny reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer; a seven-day period to prepare such a focused reply is not unreasonable. If there are *special circumstances*, the requestor/petitioner may request a *short extension* from the presiding officer.” *Final Rule, Changes to Adjudicatory Process*, 69 Fed. Reg. 2182, 2203 (January 14, 2004) (emphases added).<sup>5</sup> Additionally, “[r]equests for an extension of time should generally be in writing and *should be received by the Board well before the time specified expires.*” *Statement of Policy on Conduct of Licensing Proceedings*, 46 Fed. Reg. 28,533, 28,535–36 (May 27, 1981) (emphasis added).

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<sup>4</sup> No stipulation is involved here.

<sup>5</sup> The Commission has elsewhere emphasized that, when ruling on a request for an extension of time, the threshold for a finding of good cause is high: “The Commission, of course, recognizes that the boards may grant extensions of time under some circumstances, but *this should be done only when warranted by unavoidable and extreme circumstances.*” *Policy on Conduct of Adjudicatory Proceedings; Policy Statement*, 63 Fed. Reg. 41,872, 41,874 (August 5, 1998). The D.C. Circuit has upheld this interpretation, finding the NRC’s standard “did not significantly or unreasonably change the regime pursuant to which requests for extensions of time are judged, because the ‘unavoidable and extreme circumstances’ standard is not off the moorings of ‘good cause.’” *National Whistleblower Ctr. v. NRC*, 208 F.3d 256, 263-64 (D.C. Cir. 2000).

The federal courts have likewise carefully defined the circumstances under which they will find good cause for granting extensions of time. As with the Commission, any request for an extension of time should be filed *before* the specified time period expires. See *Marsh v. Richardson*, 873 F.2d 129, 130 (6th Cir. 1989) (rejecting notice of extension filed thirty-one days after entry of order because an “extension of time due to a showing of good cause is only granted when the notice of appeal is filed before the thirty day time period under [Federal] Rule [of Appellate Procedure] 4(a) expires”). Further, courts typically grant extensions of time only in unique and extraordinary circumstances, such as “where forces beyond the control of the appellant”—an incapacitating illness, for example—prevent him from meeting a filing deadline. *Nicholson v. City of Warren*, 467 F.3d 525, 526 (6th Cir. 2006), *citing* *Mirpuri v. ACT Mfg., Inc.*, 212 F.3d 624, 630 (1st Cir. 2000). Moreover, even if such a circumstance might be present, courts require the individual requesting an extension of time to support his request with adequate information. See *id.* (“ . . . while lengthy incapacitating illness might constitute good cause, Nicholson gave no details of the duration of her medical treatment which would indicate that she had been unable to file a notice of appeal within thirty days of the court's order”).

In the present case, the Board should reject the Petitioner’s request for an extension of time because the Petitioner (1) did not request an extension until after the period for filing a reply had expired; (2) fails to show there are special circumstances supporting his request; and (3) seeks an extension of 57 days, a highly unreasonable length of time.<sup>6</sup>

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<sup>6</sup> The Staff would additionally note that the Petitioner did not consult the Staff prior to filing his request for an extension of time. See 10 C.F.R. § 2.323(b) (“A motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful”).

DISCUSSION

The Board should reject the Petitioner's request for an extension of time in the first instance because the Petitioner did not file his request until after the seven-day period for submitting his reply had expired. The Staff served the Petitioner with its answer by mail on September 11, 2007. Thus, the Petitioner's reply was due September 24, 2007, and the Petitioner's request for an extension of time, contained in his letter dated September 25, 2007, was filed one day late.<sup>7</sup> The Petitioner's request therefore fails to comply with Commission policy, which holds that a request for an extension of time "should be received by the Board *well before the time specified expires.*" 46 Fed. Reg. at 28,535–36 (emphasis added). Moreover, even though the Petitioner filed his request only one day late, that alone is sufficient to deny the Petitioner an extension of time. *Marsh v. Richardson*, 873 F.2d at 130 (6th Cir. 1989).

Second, the Petitioner fails to demonstrate there are "special circumstances" justifying an extension of time, as the Commission requires. 69 Fed. Reg. at 2203. The Petitioner is an academician whose "business days follow the school calendar and its holidays," and the Petitioner is requesting an extension of time in order to "1. seek advice of counsel[;] 2. conduct further research on laws applicable to ASLB hearings[; and] 3. secure additional documents pertinent to this proceeding." However, the petitioner fails to demonstrate that any of these factors is a "special circumstance." Beyond stating that he is employed as an academician, the Petitioner does not provide any information about his employment to suggest why he was unable to reply to the Staff's answer within the prescribed seven-day period. The other factors

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<sup>7</sup> The period of time for filing the reply began to run September 12, 2007. Taking the seven-day period in 10 C.F.R. § 2.309(h)(2) and adding five days because the Staff served the Petitioner by mail, the Petitioner's reply would have been due September 23, 2007; however, because that date fell on a Sunday, the reply was due the next day, September 24, 2007. 10 C.F.R. § 2.306.

cited by the Petitioner are all rather ordinary circumstances that were almost certainly considered by the Commission when weighing the length of time to allow for replies. No factor can be considered a “force beyond the control of the appellant,” such as an incapacitating illness, that might support an extension of time. *Nicholson v. City of Warren*, 467 F.3d at 526. Further, even if there were “special circumstances” underlying the Petitioner’s request, he has failed to set them forth in his one-page filing before the Board. For example, the Petitioner states that he needs additional time to “secure additional documents,” but he does not describe those documents in any detail or explain why he has been unable to obtain the documents previously. The individual requesting an extension of time has the burden of supporting his request with adequate information; to the extent he fails to provide such information, as here, his request must be denied. *Id.*

Moreover, the Petitioner’s claim that he needs an extension of time to conduct further legal research and secure additional documents suggests that in any reply he would seek to expand the scope of his arguments beyond those set forth in his original hearing request. It is well established in NRC proceedings that a reply is not to be used for that purpose. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223 (2004), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004). “Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it. New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. §§ 2.309(c), (f)(2).” *Nuclear Management Co., L.L.C.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006). *See also* 9 James Wm. Moore, *Moore's Federal Practice* ¶ 228.02 (1995) (“The case law is to the effect that the appellant cannot raise new issues in a reply brief. . . .”).

Finally, the Petitioner seeks an extension of 57 days, a period which—when added to

the original 7-day response period—would result in an almost *tenfold* increase in the amount of time the Commission provided for a reply under 10 C.F.R. § 2.309(h)(2). Granting such an extension would be wholly inconsistent with the Commission’s intent that in “special circumstances, the requestor/petitioner may request a *short extension* from the presiding officer.” 69 Fed. Reg. at 2203. In cases where a licensing board has granted an extension of time for filing a reply, the extension has been of far more limited duration. *E.g., State of Alaska Dept. of Transportation and Public Facilities* (Confirmatory Order Modifying License), ASLBP No. 04-827-02-CO, (May 12, 2004) (unpublished order available at ADAMS ML041330518) (approving 10-day extension of time in which to file reply).

CONCLUSION

The Petitioner’s request for an extension of time in which to file his reply is untimely; the Petitioner fails to cite special circumstances justifying *any* extension of time; and the extension the Petitioner seeks, 57 days, is highly unreasonable. It appears the Petitioner may be seeking an extension of time in order to expand the scope of his arguments beyond those set forth in his original hearing request. However, that is not the purpose of the reply brief. The Board should therefore reject the Petitioner’s request for an extension of time in which to file a reply.

Respectfully submitted,

**/RA/**  
Michael J. Clark  
Counsel for the NRC Staff

Dated at Rockville, Maryland  
this 4th day of October, 2007